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No. 1228

In the Supreme Court of the United States

OCTOBER TERM, 1967

WILTON ROSS THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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297-044—68——1

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1968. A petition for rehearing was denied on February 12, 1968. The petition for a writ of certiorari was filed on March 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that petitioner paid for a car in bills of small denominations some time after the

bank burglary was admissible without proof that petitioner was impecunious prior to the offense.

2. Whether the conduct of government counsel requires reversal.

3. Whether the trial judge erred in failing to give petitioner's requested instruction on impeachment.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of entering a federally insured savings and loan association with intent to commit a felony, in violation of 18 U.S.C. 2113(a).[1] On October 14, 1966, he was sentenced to imprisonment for eight years. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence may be summarized as follows:

1. Prior to the offense, petitioner was employed as an electrician foreman for the Scott Electrical Co., San Francisco, California (Tr. 49).[2] His "girl friend," Sheila Coates,[3] worked at the Stockton Street branch of the First Savings and Loan Association. She had a key to one of the entrances of the bank (Tr. 20, 29).

Michael Heim testified that in June, 1964, he worked with petitioner at a construction site. Several weeks before the offense was committed, petitioner

[1] This was petitioner's second trial. His first was declared a mistrial because the jury could not agree.

[2] The nine-volume transcript of trial ("Tr.") has been filed with the Clerk of the Court.

[3] By the time of the second trial, Miss Coates had married petitioner (Tr. 621).

approached Heim about assisting in a bank burglary (Tr. 145). Petitioner had the entire plan prepared, but said he was physically unable to carry it out alone (Tr. 145–146). Some time before July 4, petitioner took Heim into the Stockton Street branch bank, during business hours. They proceeded to the basement, where petitioner located the rear of the vault, made of cinder block.[4] Petitioner pointed to a canvas and sledge hammer to be used to force an entry into the vault, and showed how he could disengage the panic alarm (Tr. 147–148). They agreed upon the July 4th weekend as the date for carrying out the burglary. Before the appointed date, however, Heim decided not to go through with the plan (Tr. 149).

Nathan Robeson, an apprentice carpenter who, like Heim, worked at the construction site for a period of time, also had discussed committing the bank burglary with petitioner (Tr. 233, 234). Petitioner and Robeson entered the bank during business hours, and proceeded to the location of the vault. Petitioner showed Robeson an area of the vault marked with an "X", where entry could be made without setting off an alarm by knocking a hole with a sledge hammer (Tr. 237). Robeson was to receive $1,000 for his work (Tr. 238). Petitioner told Robeson that the best time to commit the offense would be on a weekend (Tr. 238).

On Friday, July 31, Robeson met petitioner between 5 and 6 p.m. across the street from the bank.

[4] Petitioner was familiar with the interior of the bank building, because he had assisted in its remodeling earlier that year (Tr. 30, 46–47).

Petitioner gave Robeson a key to the bank entrance and then departed (Tr. 240). At approximately midnight Robeson entered the bank (Tr. 252). He proceeded to the basement vault, and, using the sledge hammer situated nearby, cracked a 21″ x 25″ hole in the vault (Tr. 71, 241). He then waited several hours for petitioner to arrive. In the meantime, Robeson broke into two vending machines located elsewhere in the bank building (Tr. 243). Petitioner came at about 7 a.m. Saturday, August 1 (Tr. 250–251). He crawled into the vault and removed a number of teller's cash boxes (Tr. 243–244). The containers were forced open. Currency was placed in one box and coins in another. Robeson was allowed to keep the coins, which amounted to $640 (Tr. 250). The pair departed with the money and some tools at about 7:30 a.m. (Tr. 251). The amount of money taken exceeded $19,000 (Tr. 27).

Fearing that his witholding of information might affect his parole status,[5] Heim communicated with the F.B.I. in October 1964, and described to agent Padden his unconsummated burglary plan with petitioner (Tr. 74). Following an investigation, petitioner and Robeson were arrested in December. Thereafter, Robeson entered a plea of guilty and received an eighteen-month sentence, which he was serving at the time of trial (Tr. 232, 254).

2. In an effort to establish that he was not at the Stockton Street Bank between 7 and 8 a.m. on Saturday, August 1, petitioner called several witnesses

[5] Heim had been convicted in 1964 by a Nevada court for placing his wife in a house of prostitution (Tr. 160).

who testified that he had arrived at work on Saturday at approximately 8 o'clock.[6] Sheila Coates then took the stand and testified that she was with petitioner from 6 p.m. on Friday to 7:30 Saturday morning, when petitioner left for work (Tr. 622–633). She stated that they spent the time at their apartment, and that a friend of petitioner, David Calhoun, was with them for the entire time. Calhoun and petitioner slept in the bedroom on Friday night, and Miss Coates slept on the living room couch. The bedroom alarm clock went off at 6:30–6:45 (Tr. 632). Miss Coates recalled that she chided petitioner for taking his time preparing for work, and that he departed after breakfast, at 7:30 (Tr. 633). Calhoun gave similar testimony (Tr. 694–699).

ARGUMENT

1. One of the government's witnesses, Sterling Blair, testified that on September 13, 1964, he had sold an automobile to petitioner for $3,000 (Tr. 321–341, 384–389). Blair received a $50 down payment on that date and asked that the balance be paid by cashier's check or cash. The following evening, petitioner paid the balance in bills of one, five and ten dollar denomination, which he removed from a brown paper shopping bag (Tr. 338). Blair recalled that he was given

[6] F.B.I. agent Padden testified that the distance between the Stockton Street bank and the building where petitioner worked on Saturday, August 1 was three-tenths of a mile, and required less than four minutes of driving time to travel. The Eastman Hotel, which Robeson described as the place to which he and petitioner went after the burglary and before they separated, was 1.3 miles and four and a half minutes away (Tr. 88–89).

$200 in one-dollar bills, and two large bundles of fives (Tr. 325, 386). When Blair expressed surprise at the manner in which payment was made, petitioner explained that he had been detained in court during the day, and found it necessary to get the cash from his company's office rather than the bank (Tr. 337).

The admission of Blair's testimony was proper. There is a general rule that proof of unexplained possession of unusual amounts of money following an offense for which pecuniary gain is the motive requires a preliminary showing of impecuniosity before the crime as a foundation for admissibility.[7] However, Blair's testimony showed more than the fact that petitioner had money. As the trial judge and court of appeals noted, the peculiar manner of payment barely one month after the bank burglary, using small bills carried in a paper shopping bag, was of sufficient probative value that no foundation of impecuniosity was necessary. See I Wigmore on *Evidence* (3d ed. 1940) § 154. In light of prior testimony that petitioner's employer had not loaned him any money in September, 1964, and had always paid his wages by check (Tr. 51), the explanation offered by petitioner for the unusual mode of payment—that he had obtained the funds from his job—was also a matter for the jury to weigh.

Reliance upon *Williams* v. *United States,* 168 U.S. 382, is misplaced. In that case a customs agent had been charged with extorting $100 on one occasion and

[7] The Ninth Circuit reaffirmed the general rule less than six months before its decision in the instant case. *Sidders* v. *United States,* 381 F. 2d 513.

$85 on another. This Court held that evidence showing that the defendant made bank deposits over a two-year period totalling $4,750 could not possibly have been connected with, and had no relevance to, the offenses charged. The ruling was thus based on the particular facts of that case. See *United States* v. *Jackskion,* 102 F. 2d 683, 684 (C.A. 2), certiorari denied, 307 U.S. 635.

2. There was no misconduct by the prosecuting attorney warranting reversal.

a. In his opening statement, government counsel prefaced his remarks by saying (Tr. 12):

> What I say to you is not evidence in the case. It is my view of what the witnesses will testify to. You will be instructed later that the only evidence in the case is what you hear from the witnesses and what is admitted into evidence. What I say is merely a guide and my opinion of what the Government will show.

Counsel then described what he expected to elicit from his witnesses. He referred to petitioner's financial burdens due to an impending divorce action, his maintenance of a residence with one Mary Alomar, to whom he exhibited a large amount of cash, and his purchase of a hi-fi set. Counsel then terminated his opening statement (Tr. 18):

> That is the Government's evidence in this case, ladies and gentlemen, for your outline. Please remember my statements are not evidence in the case. The witnesses will relate what I have said. Thank you.

The evidence did not establish the allegations made in the opening statement regarding petitioner's divorce problems, the hi-fi set, or Mary Alomar. At the end of the government's evidence, defense counsel, citing the absence of evidence, moved for a mistrial. The motion was denied (Tr. 551–553). In his closing charge, the judge advised that if the jury found any variance between the testimony and arguments of counsel, "to the extent of such variance you must consider only the factors testified to" (Tr. 775). Later, the court admonished (Tr. 782):

> Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

Since the comments made in the opening statements were never repeated nor referred to during the remainder of the lengthy trial, and in light of the explicit statement by the prosecuting attorney that his opening comments were not evidence, as well as the court's instruction limiting the jury to consideration of the evidence adduced at trial, the comments in the opening statement were not sufficient grounds for a mistrial. *United States* v. *Ramirez,* 367 F. 2d 813 (C.A. 7), certiorari denied, 385 U.S. 988; *Cook* v. *United States,* 354 F. 2d 529 (C.A. 9).

b. The incidents during trial described by petitioner (Pet. 23–27) provide no occasion for reversal.

(*i*) Unaware of the background of a defense witness, government counsel asked him on cross-examination whether he had been convicted of a felony. The witness replied that he had "been picked up on a 502,

yes, down in Sacramento" (Tr. 569, Pet. 25). The trial judge was not certain what a "502" was, and indicated that he would examine the matter before ruling on the admissibility of the testimony (Tr. 570). The matter, however, was resolved by counsel the same day, when defense counsel agreed to let the record stand if government counsel would not comment on the conviction in his closing argument (Tr. 610). The following colloquy then ensued between defense counsel and the court (Tr. 610–611):

> The COURT. All right. For the record, Mr. Cragen, we are not going to pursue further the question of Mr. Leighty. Don't forget he was asked a question, "Were you ever convicted of a felony?" His answer was "Yes, 502," or something like that.
>
> Mr. CRAGEN. It is as irrelevant as this, actually.
>
> The COURT. You are not going to pursue it further?
>
> Mr. CRAGEN. No.
>
> The COURT. We will withdraw the objection and let it stand.
>
> Mr. CRAGEN. Let it stand and there will be no comment.

(*ii*) Government counsel commenced his cross-examination of Sheila Coates by asking whether she had testified in the first case. After receiving an affirmative answer, counsel asked about her interviews with the F.B.I. (Tr. 651). She stated that at the first interview, shortly after the offense was committed, she had not been told what time the burglary had occurred (Tr. 652). A second interview occurred at the bank on

the day petitioner was arrested (Tr. 652–653). After some questions concerning Miss Coates' knowledge of Michael Heim, counsel asked whether Heim had told her of his trip to the bank with petitioner. Miss Coates indicated that neither Heim nor petitioner had ever mentioned the bank trip (Tr. 655). Returning to questions about her F.B.I. interviews, counsel elicited the fact that she had not been questioned at any time after the second interview. Counsel asked whether Miss Coates had been subpoenaed and had testified before the grand jury, and received an affirmative reply. He then asked, "In fact, you refused to testify, didn't you?" Before the witness responded, defense counsel objected, and the court admonished the jury, "There is a perfect right, ladies and gentlemen, that anyone has upon a statement of proper reason" (Tr. 656). Government counsel was then allowed to ask whether Miss Coates had, on advice of counsel, refused to give testimony at the grand jury proceeding. She replied that she refused to answer some questions; but that she did not recall that any such questions referred to the weekend (Tr. 657). After that response, counsel cross-examined at length concerning his own attempt to interview Miss Coates, some of the responses she gave at the first trial, and her testimony on direct examination. During the course of the cross-examination (Tr. 650–682), Miss Coates testified that when contacted by the F.B.I. and informed of petitioner's arrest, she had immediately exclaimed that she had been with petitioner for the entire weekend (Tr. 679). She could not recall whether,

prior to her spontaneous statement, the agent had told her exactly when the burglary had occurred (Tr. 679–681).

No further reference was made to the grand jury testimony during the remainder of the trial or during closing argument. In view of the abundant evidence of guilt, the context in which the question objected to by petitioner was framed, and the nature of the full testimony elicited from Miss Coates, the passing reference by government counsel to her having invoked a constitutional privilege before the grand jury (followed by an admonition by the trial judge) was not prejudicial to petitioner.

c. None of the numerous attacks now made on counsel's closing argument was the basis of objection at trial. No exceptional circumstances exist warranting deviation from the rule that this Court will not review arguments to the jury where defense counsel remains silent, interposes no objection, and waits until after the verdict to allege impropriety. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238–239. The summation by government counsel was fully supported by testimony in the record and permissible inferences that could properly be made in counsel's interpretation of the testimony. While reference to some of petitioner's witnesses as liars might be regarded as a questionable tactic, in the context of this case it does not call for reversal, especially in view of defense counsel's similar use of language.[8] The char-

[8] In his closing argument, defense counsel characterized witnesses Heim and Robeson as perjurers (8 R. 19, 25), and added the term "pathological liar" to his description of Robeson (8 R. 25).

acterization of any part of government counsel's summation as unfair comment on petitioner's failure to testify (Pet. 22) requires a strained interpretation of the remarks. Counsel reviewed Robeson's testimony regarding petitioner's movements after they left the bank and compared it to the testimony of petitioner's alibi witnesses (Tr. 750). His statement in this context that "the only period of time that Mr. Thompson can't adequately explain what he was doing is that crucial moment between 7:00 and 8:00 in the morning" was manifestly not of such character that the jury would naturally take it to be a comment on petitioner's failure to testify. Moreover, the court instructed the jury: "The law does not compel a defendant in a criminal case to take the witness stand. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant has not testified herein. The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence" (Tr. 779–780).

3. The trial judge was not required to give the impeachment instruction offered by petitioner's counsel. While the closing charge did not use the term "impeachment," a reading of the charge in its entirety demonstrates that the jury was adequately instructed on the matters normally encompassed within an impeachment instruction. The court stated that the presumption that a witness speaks the truth could be negated "by the manner in which he testifies, by the character of his testimony, by contradictory evidence,

by his motives or by evidence that he has been convicted of a felony" (Tr. 774). If, said the court, it had been shown that a witness testified falsely on a material matter, his testimony in other particulars need not be trusted. Factors which the jury were instructed to consider in determining what weight, if any, to attach to a witness' testimony included the extent to which the witness had been contradicted or corroborated by other evidence, as well as "any other matter which reasonably sheds light upon the credibility of the witness" (Tr. 775). Accordingly, this issue, and all others, were adequately covered in the closing charge.[9]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

APRIL 1968.

[9] Petitioner's claim that the court erred in refusing his motion for mistrial (Pet. 31) contains the same argument that he raises in his allegation regarding the conduct of government counsel (Pet. 19), *supra*, pp. 7–8. His contention that the court of appeals based its decision on matters not adduced at trial (Pet. 15–18) is frivolous. The record sufficiently supports the court's evaluation of the evidence, see Tr. 386, 643.

U.S. GOVERNMENT PRINTING OFFICE: 1968